

No. PD-0035-21

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

RECEIVED
COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

JERROD P. ROLAND,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Fort Bend County
No. 01-19-00752-CR

* * * * *

STATE'S RESPONSE BRIEF

* * * * *

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* * * * *

STATE'S RESPONSE BRIEF

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

ARGUMENT

1. Policy and Politics Do Not Control Constitutional and Statutory Construction.

¹ Because Mr. Roland was the appealing party below, he is the Appellant.

The question of whether county and district courts share concurrent jurisdiction over misdemeanor official misconduct cases was not raised before the State’s highest criminal court and equitably briefed as an academic exercise without regard to real-world consequences.² It is a legal question involving a legion of constitutional and statutory provisions and accompanying case law that Appellant neither adds to nor subtracts from in his brief. Instead, Appellant posits that policy and politics should be determinative because forum shopping will be used as a destructive tool to overturn local elections.³ This is a dangerous argument premised on the presumption that elected judges will not act as neutral arbiters⁴ and that elected prosecutors will not faithfully discharge their duty “to see that justice is done” and to “insure a fair trial for both the state and the defendant[.]”⁵ And, when applicable, it also presumes that juries will not be impartial⁶ and will refuse to follow the law as provided in their

² See Appellant’s Brief at 9 (“Let the rest of us go back to practicing law in the real world, where jurisdiction has real consequences, and should not be expanded as an academic exercise in order to see what might happen.”).

³ See Appellant’s Brief at 6-8.

⁴ See *Brown v. State*, 122 S.W.3d 794, 797 (Tex. Crim. App. 2003) (“the judge is a neutral arbiter between the advocates; he is the instructor in the law to the jury, but he is not involved in the fray.”).

⁵ TEX. CODE CRIM. PROC. arts. 2.01, 2.03(b).

⁶ See TEX. CONST. Art. I (1), § 10 (“In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury.”); U.S. CONST. amend. VI (“In

instructions.⁷ If such a partisan presumption were afforded any legitimacy, then the rule of law itself—also representative of the democratic process—would be subject to arbitrary and limitless nullification. Therefore, the accusation challenging the judiciary’s integrity under the guise of a rational policy consideration should be rejected outright. Importantly, it is wholly inconsistent with this Court’s canons of constitutional and statutory construction.⁸ As this Court has previously recognized, “Public-policy arguments quickly pile up on both sides of the debate But they find utility only in the Legislature and should be directed there.”⁹

Further, allowing unsubstantiated political animus to not only be a factor but a predominant factor for construing the law would result in the absurdity of the judiciary exceeding its authority by unduly encroaching upon the lawmaking branch

all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]”).

⁷ See *Reeves v. State*, 420 S.W.3d 812, 818 (Tex. Crim. App. 2013) (“we will assume that the jury followed its written instructions”) (quoting *Miles v. State*, 204 S.W.3d 822, 827-28 (Tex. Crim. App. 2006)).

⁸ See *Boykin v. State*, 818 S.W.3d 782, 785 (Tex. Crim. App. 1991) (the literal text is the law that was intended and courts are constitutionally required to expect the judiciary to follow the text as written).

⁹ *State ex rel. Wice v. Fifth Jud. Dist. Ct. of Appeals*, 581 S.W.3d 189, 199 (Tex. Crim. App. 2018) (quoting *In re Allen*, 462 S.W.3d 47, 53 (Tex. Crim. App. 2015)).

and the constitution-based voting rights granted to Texans.¹⁰ By contrast, this Court’s continuous hands-off approach when it comes to matters of policy honors Texas’ separation of powers mandate.¹¹

2. Ineligibility and Removal From Office are Not a Mystery.

Appellant contends that a recognition of concurrent jurisdiction will open a pathway to unchartered territory with respect to local election eligibility and removal.¹² Those pathways, however, have been clearly mapped.

¹⁰ See *Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017) (“Judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”) (citation omitted); *State v. Rhine*, 297 S.W.3d 301, 305-06 (Tex. Crim. App. 2009) (“The legislature . . . declares the public policy of the state and may depart from established public policy, reshape it, or reform it.”); TEX. CONST. Art. XVII (17), § 1 (proposed amendments to the Texas Constitution are submitted to voters).

¹¹ See TEX. CONST. Art. II (2), § 1 (“The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”).

¹² Appellant’s Brief at 8 states:

Next, no power of removal exists in county court, so one would be left with this –should a petition for removal be filed after the conviction? Would the district court handling that have had first-hand knowledge of the misconduct so as to enable it to grant or deny the petition? Would the elected but convicted DA be permitted to stand for re-election? We do not know the answers to these questions. If the State has its way, we

a. Ineligibility for Public Office.

Under Article XVI (16), § 2 of the Texas Constitution, the Legislature shall enact laws “to exclude from office persons who have been convicted of bribery, perjury, forgery, or other high crimes.”¹³ The Legislature has determined that a felony conviction will render any person ineligible for Texas¹⁴ public office if that person “has not been pardoned or otherwise released from the resulting disabilities.”¹⁵ TEX. ELEC. CODE § 141.001(a)(4).

b. Removal From Public Office.

Article V (5), § 24 of the Texas Constitution states:

County Judges, county attorneys, clerks of the District and County

will have to find out.

¹³ “High crimes” for purposes of the application of TEX. CONST. Art. XVI (16), § 2 jury service do not include felony driving while intoxicated or all felonies *per se*. *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000). It is limited to crimes “which demonstrate[] the same type of moral corruption and dishonesty inherent in the specified offenses.” *Id.*; *but see Evans v. State*, No. 05-12-01179-CR, 2014 WL 1415093, at *13 (Tex. App.—Dallas Mar. 28, 2014, pet. ref’d) (not designated for publication) (organized criminal activity based on the underlying misdemeanor offense of gambling promotion is a high crime).

¹⁴ Section 141.001(a)(4) does not apply to candidates seeking election to the Office of the President. *See LaRouche v. Hannah*, 822 S.W.2d 632, 633-34 (Tex. 1992) (per curiam).

¹⁵ “[C]ompleting one’s sentence does not amount to release from resulting disabilities.” *In re Donalson*, No. 12-20-00197-CV, 2020 WL 5406248, at *5 (Tex. App.—Tyler Sept. 9, 2020, no pet.) (not designated for publication).

Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, *official misconduct*, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing and the finding of its truth by a jury.

(emphasis added). Further, Article XV (15), § 6 provides that a district judge who is guilty of official misconduct shall be removed by the Texas Supreme Court.¹⁶

Article XV (15), § 7 states that the Legislature shall enact laws “for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution.”

Chapter 87 of the Local Government Code governs removal of county officers.¹⁷ Subchapter B applies to civil removal proceedings, and Subchapter C

¹⁶ The Supreme Court shall have original jurisdiction to hear and determine the causes aforesaid when presented in writing upon the oaths taken before some judge of a court of record of not less than ten lawyers, practicing in the courts held by such judge, and licensed to practice in the Supreme Court; said presentment to be founded either upon the knowledge of the persons making it or upon the written oaths as to the facts of creditable witnesses.
TEX. CONST. Art. XV (15), § 6.

¹⁷ A vacancy, for purposes of the Election Code, occurs on the date the judgment becomes final. TEX. ELEC. CODE § 201.024 (“If an officer is removed from office by a court or other tribunal, a vacancy occurs on the date the judgment becomes final.”).

There are additional methods of removal for other officers. Notably, removal of an officer of a municipality is governed by Subchapter B of Chapter 21 of the

governs automatic removal related to a criminal prosecution. *In re Bazan*, 251 S.W.3d 39, 42 (Tex. 2008).

i. Chapter 87, Subchapter B: Civil Removal Proceedings for County Officers.

An “officer may be prosecuted criminally on the same charges either before or after the [civil] removal proceedings.” *Meyer v. Tunks*, 360 S.W.2d 518, 520 (Tex. 1962).

In the civil sphere, under Subchapter B, a county officer¹⁸ may be removed for

Local Government Code. Additionally, “the authority for a home-rule city council to remove one of its members must be found in the city’s charter.” *Lipscomb v. Randall*, 985 S.W.2d 601, 605 (Tex. App.—Fort Worth 1999, pet. dism’d).

¹⁸ County officers subject to removal by a district judge include:

- (1) a district attorney;
- (2) a county attorney;
- (3) a county judge;
- (4) a county commissioner;
- (5) a county clerk;
- (6) a district clerk;
- (7) a district and county clerk;
- (8) a county treasurer;
- (9) a sheriff;
- (10) a county surveyor;
- (11) a county tax assessor-collector;
- (12) a constable;
- (13) a justice of the peace;
- (14) a member of the board of trustees of an independent school district;
- and
- (15) a county officer, not otherwise named by this section, whose office is created under the constitution or other law of this state.

official misconduct. TEX. LOC. GOV'T CODE § 87.013(a)(2). “‘Official misconduct’ means intentional, unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law.” TEX. LOC. GOV'T CODE § 87.011(3). Under “the forgiveness doctrine,” an officer cannot be removed for acts committed before the officer’s election.¹⁹ *In re Bazan*, 251 S.W.3d at 42-45 (discussing applicability of TEX. LOC. GOV'T CODE § 87.001 to only Subchapter B, which provides: “An officer may not be removed under this chapter for an act the officer committed before election to office.”).

A civil removal proceeding in district court is initiated by the filing of a sworn petition for removal by “[a]ny resident of this state who has lived for the last six months in the county in which the petition is to be filed and who is not currently under indictment in the county[.]” TEX. LOC. GOV'T CODE § 87.015(a), (b). The

TEX. LOC. GOV'T CODE § 87.012.

Appellant would not have been subject to Subchapter B because he was an employee of the Juvenile Probation Department. 1 CR 11, 82-92.

¹⁹ “The doctrine’s rationale is that the public has the authority ‘to forgive the misconduct of an elected official’ following a campaign in which all the facts would presumably become known.” *In re Bazan*, 251 S.W.3d at 42 (quoting *In re Brown*, 512 S.W.2d 317, 321 (Tex. 1974)).

petition must present the grounds for removal “in plain and intelligible language and must cite the time and place of the occurrence of each alleged act as a ground for removal with as much certainty as the nature of the case permits.” TEX. LOC. GOV’T CODE § 87.015(c). The grounds are not dependent on proof of a criminal charge. *Huntress v. State*, 88 S.W.2d 636, 643-44 (Tex. Civ. App.—San Antonio 1935, no writ) (civil removal proceeding not dependent on proof of criminal charges).

The petitioning party must apply in writing to the district court for an order requiring a citation and for a certified copy to be served on the accused officer. TEX. LOC. GOV’T CODE § 87.016(a). “If the judge refuses to issue the order for citation, the petition shall be dismissed at the cost of the person filing the petition.” TEX. LOC. GOV’T CODE § 87.016(c). But, if a citation is ordered by a district court, the citation “shall order the officer to appear and answer the petition[.]” TEX. LOC. GOV’T CODE § 87.016(c). After this, the district court may temporarily suspend the officer and appoint another person to perform the officer’s duties. TEX. LOC. GOV’T CODE § 87.017(a).

In a civil removal proceeding, the State is represented by a county or district attorney, not a private party. TEX. LOC. GOV’T CODE § 87.018(d)-(f); *State ex rel. Dishman v. Gary*, 359 S.W.2d 456, 458 (Tex. 1962) (“The remedy of ouster is one which belongs to the state, in its sovereign capacity, to protect the interests of the

people as a whole and guard the public welfare by ousting incumbents of office who wrongfully hold to the injury of the public.”) (cleaned up). An accused official has the right to a jury trial,²⁰ and the burden of proof is preponderance of the evidence. TEX. LOC. GOV’T CODE § 87.018(a); *In re Bazan*, 251 S.W.3d at 42. A finding of true is required, and a special verdict form is needed when there are multiple allegations:

Under a proper charge applicable to the facts of the case, the judge shall instruct the jury to find from the evidence whether the grounds for removal alleged in the petition are true. If the petition alleges more than one ground for removal, the jury shall indicate in the verdict which grounds are sustained by the evidence and which are not sustained.

TEX. LOC. GOV’T CODE § 87.018(c).

ii. Chapter 87, Subchapter C: Removal Upon Conviction in District Court.

Removal under Subchapter C is the most efficient avenue when the basis is official misconduct because removal cannot be effectuated in county court. Immediate removal occurs concurrently with a criminal conviction following a jury verdict for any felony or misdemeanor involving official misconduct in district

²⁰ The right to a jury trial does not prevent a trial court from granting a motion for summary judgment based on the lack of a genuine issue of material fact. *Ross v. Akin*, No. 02-14-00128-CV, 2014 WL 7334924, at *3 (Tex. App.—Fort Worth Dec. 23, 2014, no pet.) (not designated for publication).

court.²¹ TEX. CONST. Art. V (5), § 24 (county officers “may be removed by the Judges of the District Courts for . . . official misconduct . . . upon the cause therefor being set forth in writing and the finding of its truth by a jury”); TEX. LOC. GOV’T CODE § 87.031(a) (“The conviction of a county officer by a petit jury for any felony or for a misdemeanor involving official misconduct operates as an immediate removal from office of that officer.”); *see also* TEX. GOV’T CODE § 33.038 (a judge is automatically removed from office if the judge is convicted of or granted deferred for a felony or misdemeanor involving official misconduct). A final judgment is not needed for a temporary removal. TEX. LOC. GOV’T CODE § 87.032 (“If the officer appeals the judgment, the appeal supersedes the order of removal unless the court that renders the judgment finds that it is in the public interest to suspend the officer pending the appeal.”). And, arguably, a final judgment is not required for permanent, automatic removal.²² *Compare Eckels v. Gist*, 743 S.W.2d 330, 332 (Tex.

²¹ Presumably, a jury verdict would not be required when the defendant’s right to a jury trial was waived. *See* TEX. CODE CRIM. PROC. art. 1.13 (waiver of right to trial by jury); *see e.g.*, *Ross*, 2014 WL 7334924, at *2 (guilty-plea misdemeanor conviction provided basis for immediate removal under TEX. LOC. GOV’T CODE § 87.031(a) in a civil removal proceeding).

²² “Removal statutes . . . are generally triggered by either (1) entry of a judgment of conviction or (2) a judgment of conviction becoming final.” *Mastrangelo v. State*, No. 09-05-00337-CR, 2007 WL 1052438, at *3 (Tex. App.—Beaumont Apr. 4, 2007) (not designated for publication) (citing Susan L. Thomas, Annotation, What constitutes conviction within statutory or constitutional

App.—Houston [1st Dist.] 1987, no pet.) (“We hold that the word ‘conviction’ as used in TEX. LOC. GOV’T CODE section 87.031(a) requires a judgment.”), and *Lipscomb*, 985 S.W.2d at 608-09 (finality is not required because, “The public’s interest in maintaining confidence in its elected officials is paramount to the right of a convicted officeholder to hold office pending appeal, even though harm may be caused to the official should the conviction be ultimately reversed on appeal.”), *with* Tex. Att’y Gen. Op. GA-0933 (2012) (indicating that the appeal provision may preclude finality unless there is no appeal or the right to appeal is exhausted).

c. Questions Posed But Not Answered are Now Answered.

Appellant poses the following questions, which the State will now answer:

i. Should a removal petition be filed after a conviction in a county court at law?

Yes. Without a district-court judgment of conviction, a civil removal proceeding should be initiated. *See, e.g., Ross*, 2014 WL 7334924, at *1 (removal petition followed guilty plea for misdemeanor abuse of official capacity).

provision making conviction of crime ground of disqualification for, removal from, or vacancy in, public office, 10 A.L.R.5th 139 (2006)).

ii. Would a district court have first-hand knowledge of the misconduct?

Yes, even if the district judge did not preside over the criminal case. As stated above, the petition must present the grounds for removal “in plain and intelligible language and must cite the time and place of the occurrence of each alleged act as a ground for removal with as much certainty as the nature of the case permits.” TEX. LOC. GOV’T CODE § 87.015(c). And the allegation(s) must be proven by a preponderance of the evidence. *In re Bazan*, 251 S.W.3d at 42. Evidence of an official’s misdemeanor county-court conviction for official misconduct would suffice. *See, e.g., Ross*, 2014 WL 7334924, at *1 (removal upheld based on judgment of conviction, supported by a judicial confession, for misdemeanor abuse of official capacity).

iii. Would an elected but a convicted district attorney be permitted to stand for reelection?

Probably not, even for a misdemeanor conviction. Under Article XVI (16), § 2 of the Constitution, a conviction for misdemeanor official misconduct would likely qualify as a “high crime.” Thus, the district attorney would not be eligible for office. *See Perez*, 11 S.W.3d at 221 (high crimes include those “which demonstrate[] the same type of moral corruption and dishonesty inherent in the specified offenses.”). And a felony conviction would render the district attorney ineligible for public office

if the district attorney had not been pardoned “or otherwise released from the resulting disabilities.” TEX. ELEC. CODE § 141.001(a)(4).

d. Conclusion.

Regardless of the foregoing, a determination of concurrent jurisdiction over official misconduct cases would not create a fundamental change in eligibility and removal. The scheme might just be utilized differently. Having to go to district court for removal based on a finding of misconduct in county court is no different than having a factfinder determine whether an offender has a prior conviction.

PRAYER FOR RELIEF

The SPA prays, again, that the Court of Criminal Appeals resolve the conflict over whether district courts have exclusive jurisdiction of misdemeanor official misconduct cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,263 exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Response Brief has been served on June 29, 2021, via email or certified electronic service provider to:

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